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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 Thomas F. McBride, Jr., } No. CV-13-01311-PHX-SPL  
9 Plaintiff, }  
10 vs. } ORDER  
11 Carolyn W. Colvin, Acting }  
12 Commissioner of Social Security }  
13 Administration, }  
14 Defendant. }  
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16 Plaintiff Thomas F. McBride, Jr., seeks judicial review and reversal of the final  
17 decision of the Commissioner of the Social Security Administration (“SSA”) denying his  
18 application for Social Security disability benefits.

19 **I. Background**

20 On September 6, 2009, Plaintiff filed an application for Social Security disability  
21 insurance benefits under Title II of the Social Security Act. (AR<sup>1</sup> 35, 143-46.) Plaintiff  
22 alleged that he became unable to work on December 30, 2008 due to his disabling  
23 conditions of depression, neuropathy, diabetes, vision and hearing problems, spina bifida,  
24 learning disabilities, and asthma. (AR 90, 143.) On March 9, 2010, the SSA denied  
25 Plaintiff’s application (AR 90-93), and on August 13, 2010, the SSA denied Plaintiff’s  
26 request for reconsideration (AR 98-100). Pursuant to Plaintiff’s request (AR 101-102), a  
27 hearing was held on January 27, 2012, before Administrative Law Judge (“ALJ”)

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<sup>1</sup> Administrative Record.

1 Thomas Cheffins (AR 35-75). On February 10, 2012, the ALJ issued a decision ruling  
2 that Plaintiff is not disabled and is not entitled to disability benefits. (AR 18-28.) On  
3 May 6, 2013, the Appeals Council denied Plaintiff's request for review of the ALJ's  
4 decision, and the decision became the final decision of the Commissioner of the SSA.  
5 (AR 1-6.)

6 Having exhausted the administrative review process, on July 1, 2013, Plaintiff  
7 sought judicial review of the ALJ's decision by filing a Complaint in this Court pursuant  
8 to 42 U.S.C. § 405(g). (Doc. 1.) On February 21, 2014, Plaintiff filed an Opening Brief,  
9 seeking remand to the ALJ for an award of disability benefits for the period of December  
10 30, 2008 through February 10, 2012. (Doc. 13 at 21-24.) On March 24, 2014, Defendant  
11 filed a Response (Doc. 14), and on April 8, 2014, Plaintiff filed a Reply (Doc. 15).

12 **II. Legal Standards**

13 To be eligible for Social Security disability benefits, a claimant must show an  
14 "inability to engage in any substantial gainful activity by reason of any medically  
15 determinable physical or mental impairment which can be expected to result in death or  
16 which has lasted or can be expected to last for a continuous period of not less than 12  
17 months." 42 U.S.C. § 423(d)(1)(a); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th  
18 Cir. 1999).

19 A five-step procedure is used to determine whether an applicant is eligible for  
20 disability insurance benefits:

21 In step one, the Secretary determines whether a claimant is  
22 currently engaged in substantial gainful activity. If so, the  
23 claimant is not disabled. In step two, the Secretary  
24 determines whether the claimant has a "medically severe  
25 impairment or combination of impairments," as defined in  
26 C.F.R. § 404.1520(c). If the answer is no, the claimant is not  
27 disabled. If the answer is yes, the Secretary proceeds to step  
28 three and determines whether the impairment meets or equals  
a "listed" impairment that the Secretary has acknowledged to  
be so severe as to preclude substantial gainful activity. If this  
requirement is met, the claimant is conclusively presumed

1                         disabled; if not, the Secretary proceeds to step four. At step  
 2                         four, the Secretary determines whether the claimant can  
 3                         perform “past relevant work.” If the claimant can perform  
 4                         such work, [he] is not disabled. If the claimant meets the  
 5                         burden of establishing an inability to perform prior work, the  
 6                         Secretary must show, at step five, that the claimant can  
 7                         perform other substantial gainful work that exists in the  
 8                         national economy.

9                         *Reddick v. Chater*, 157 F.3d 715, 721 (9th Cir. 1998) (citing 20 CFR §§ 404.1520,  
 10                         416.920).

11                         In reviewing the decision of the ALJ, the Court must affirm the ALJ’s decision  
 12                         unless it contains legal error or is not supported by substantial evidence. *Orn v. Astrue*,  
 13                         495 F.3d 625, 630 (9th Cir. 2007); *Marcia v. Sullivan*, 900 F.2d 172, 174 (9th Cir. 1990).  
 14                         Substantial evidence means more than a mere scintilla, but less than a preponderance; “it  
 15                         is such relevant evidence as a reasonable person might accept as adequate to support a  
 16                         conclusion.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007); *see also*  
 17                         *Reddick*, 157 F.3d at 720. In determining whether substantial evidence supports the  
 18                         ALJ’s decision, the Court considers the record as a whole, weighing both the evidence  
 19                         that supports and that which detracts from the ALJ’s conclusions. *Reddick*, 157 F.3d at  
 20                         720; *Tylitzki v. Shalala*, 999 F.2d 1411, 1413 (9th Cir. 1993). The ALJ is responsible for  
 21                         resolving conflicts, ambiguity, and determining credibility. *Andrews v. Shalala*, 53 F.3d  
 22                         1035, 1039 (9th Cir. 1995); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989).  
 23                         Where “the evidence can reasonably support either affirming or reversing a decision, [the  
 24                         Court] may not substitute its judgment for that of [the ALJ].” *Andrews*, 53 F.3d at 1039.  
 25                         “However, a reviewing court must consider the entire record as a whole and may not  
 26                         affirm simply by isolating a specific quantum of supporting evidence.” *Orn*, 495 F.3d at  
 27                         630 (internal quotations and citations omitted). The Court reviews “only the reasons  
 28                         provided by the ALJ in the disability determination and may not affirm the ALJ on a  
 ground upon which he did not rely.” *Id.*

1           **III. Discussion**

2           Applying the five-step sequential framework, the ALJ ruled that Plaintiff is not  
 3 disabled and is not entitled to disability benefits. (AR 21-28.) At step one, the ALJ found  
 4 that Plaintiff had not engaged in substantial gainful activity since December 30, 2008, his  
 5 alleged disability onset date. (AR 20.) At step two, the ALJ found that Plaintiff had the  
 6 following severe impairments: neuropathy in his feet and arms; diabetes mellitus; hearing  
 7 and vision problems; learning disability; asthma; and spina bifida. (AR 20.) At step  
 8 three, the ALJ found that Plaintiff's impairments did not meet or equal one of the listed  
 9 impairments described in 20 C.F.R. § 404, Subpart P, Appendix 1. (AR 21-22.)

10          At step four, the ALJ found that Plaintiff had the residual functional capacity<sup>2</sup> to  
 11 perform medium work as defined in 20 C.F.R. § 404.1567(c), with some limitations.<sup>3</sup>  
 12 (AR 22.) Based on his residual functional capacity finding and the testimony of the  
 13 vocational expert, the ALJ found that Plaintiff could no longer perform his past work. At  
 14 step five, the ALJ found that Plaintiff could, however, perform other jobs in the national  
 15 economy such as grocery bagger, warehouse worker, and meat clerk. (AR 27-28.) The  
 16 ALJ therefore concluded that Plaintiff was not disabled as defined by the Social Security  
 17 Act.

18          Plaintiff argues this Court should reverse the ALJ's decision and remand the case  
 19 for a computation of benefits because: (1) the ALJ erred in assessing the medical opinion  
 20 evidence; (2) the ALJ erred in discrediting Plaintiff's symptom testimony; and (3) the  
 21 ALJ erred in evaluating lay witness testimony. (Doc. 13 at 8-21.) In response, Defendant  
 22 contends that the ALJ's decision is supported by substantial evidence and should be

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23          <sup>2</sup> A claimant's residual functional capacity is defined as the most he or she can do  
 24 despite his or her limitations. 20 C.F.R. § 404.1545(a)(1).

25          <sup>3</sup> "Medium work" is defined as "lifting nor more than 50 pounds at a time with  
 26 frequent lifting or carrying of objects weighing up to 25 pounds." 20 C.F.R. §  
 27 404.1567(c). The ALJ listed the following exceptions to his assessment: "occasionally  
 28 climb ladders, ropes, or scaffolds; frequently climbing ramps or stairs; frequently  
 balancing, stooping, crouching, kneeling, and crawling; frequent bilateral handling and  
 fingering; avoid concentrated exposure to moving equipment and unprotected heights;  
 limited to simple, unskilled work." (AR 22.)

1 affirmed. (Doc. 14 at 11.)

2       **A. Medical Opinion Evidence**

3 Plaintiff argues that the ALJ did not offer specific and legitimate reasons,<sup>4</sup>  
 4 supported by substantial evidence in the record, for rejecting the opinions of treating  
 5 physician Nikhil Agarwal, M.D., and treating neurologist David Reynolds, M.D. (Doc.  
 6 13 at 15-21.)

7 Plaintiff began seeing treating physician Nikhil Agarwal, M.D. in September of  
 8 2008 (AR 242), and continued to be treated by him on a consistent basis through  
 9 September of 2011 (AR 238-42, 333-37, 389-400). On August 12, 2010, Dr. Agarwal  
 10 completed a “Medical Assessment of Ability to Do Work-Related Physical Activities.”  
 11 (AR 385-86.) In the assessment, he concluded that Plaintiff could not perform work for  
 12 eight hours a day or five days a week on a regular and consistent basis due to diagnosed  
 13 impairments of neuropathy and spina bifida. (AR 385-86.) Dr. Agarwal opined that  
 14 Plaintiff could sit for less than two hours and stand or walk for less than two hours in an  
 15 eight-hour work day. (AR 385.) Also, he opined that Plaintiff could lift and carry more  
 16 than 15 pounds but less than 20 pounds. (*Id.*)

17 In assessing Plaintiff’s residual functional capacity, the ALJ gave “no weight” Dr.  
 18 Agarwal’s opinion, reasoning that it was inconsistent with his own treatment records.  
 19 (AR 26.) The ALJ explained that the records showed “normal physical examination on  
 20 that day and on nearly every other visit” (AR 23), and “additional treatment notes from  
 21 the same time period show additional normal examinations, state the claimant’s  
 22 conditions are well controlled with medications, and noted that he is still not compliant  
 23 with diet requirements” (AR 26).

24 When evaluating the medical evidence throughout the five-step process, the ALJ  
 25 must give appropriate consideration based on the source of testimony. The ALJ should  
 26 afford the most weight to the treating physician’s opinion, a lesser amount of weight to an

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27       <sup>4</sup> Because Dr. Agarwal’s opinion is contradicted by other medical opinions in the  
 28 record (*see* AR 251-254, 321-327), the ALJ must offer specific and legitimate reasons for  
 rejecting Dr. Agarwal’s opinion. *See Orn*, 495 F.3d at 631.

1 examining physician's opinion, and an even lesser amount to a physician who has neither  
2 treated nor examined the claimant. *See Orn*, 495 F.3d at 631. If the treating physician's  
3 opinion is not contradicted by another physician, it is given controlling weight and may  
4 be rejected only by presenting clear and convincing reasons supported by substantial  
5 evidence in the record. *Id.* at 632. If the treating physician's opinion is contradicted, the  
6 ALJ must offer specific and legitimate reasons for rejecting the opinion. *Id.* The ALJ can  
7 "meet this burden by setting out a detailed and thorough summary of the facts and  
8 conflicting clinical evidence, stating his interpretation thereof, and making findings."  
9 *Magallanes*, 881 F.2d at 751. Moreover, an ALJ is not required to accept a brief and  
10 conclusory opinion from a treating physician that is unsupported with clinical findings or  
11 by the record as a whole. *Id.*; *Batson v. Commissioner of Social Security Admin.*, 359  
12 F.3d 1190, 1195 (9th Cir. 2004). When there are conflicting medical opinions, the ALJ  
13 must determine credibility and resolve the conflict. *Thomas v. Barnhart*, 278 F.3d 947,  
14 956-57 (9th Cir. 2002).

15 First, in rejecting his opinion on the basis that physical examinations performed  
16 were "normal," the ALJ mischaracterizes Dr. Agarwal's exam notes. Rather, his  
17 treatment notes show that Plaintiff did not have "normal physical examination[s]," as the  
18 ALJ suggests. (AR 23, 26.) After each visit with Plaintiff, Dr. Agarwal completed a  
19 standard form where he could choose to evaluate different bodily system categories as  
20 "normal" or "abnormal." Although Dr. Agarwal rarely circled either "normal" or  
21 "abnormal" in the neurological category, on two occasions when he did, he assessed  
22 Plaintiff to be neurologically "abnormal." (AR 238, 337.) He routinely circled the  
23 "normal" category for Plaintiff's other systems, such as chest, cardiovascular, and  
24 abdomen. (AR 238-42, 333-37, 389-400.) However, Dr. Agarwal's failure to circle the  
25 word "abnormal" next to the term "neurological" on some occasions does not necessarily  
26 translate that Plaintiff's examinations were "normal." On the contrary, at each of  
27 Plaintiff's visits, Dr. Agarwal noted findings of Plaintiff's conditions, such as diabetes,  
28 neuropathy, depression, panic attacks, or hyperlipidemia, and recorded his advised course

1 of action to Plaintiff to treat or maintain each condition. (AR 335, 387, 390, 401-02.)

2 In rejecting his opinion, the ALJ also mischaracterizes the treatment records from  
 3 August 12, 2010, the day Dr. Agarwal completed the medical assessment form. (AR 26,  
 4 385-86.) Although the ALJ noted that Plaintiff had a normal physical examination on  
 5 August 12, 2010, the exam findings were far from normal. Dr. Agarwal noted that  
 6 Plaintiff's diabetes was uncontrolled, that he should see a neurologist for numbness, and  
 7 that he should continue on the medication for neuropathy. (AR 333.) Although Dr.  
 8 Agarwal assessed Plaintiff's chest, cardiovascular system, abdomen, and extremities as  
 9 "normal," the ALJ does not explain how these findings detract from his opinion that  
 10 Plaintiff's ability to work is limited by his neuropathy and spina bifida impairments.

11 The ALJ additionally erred by rejecting Dr. Agarwal's opinion on the basis that  
 12 Plaintiff's impairments were "well-controlled with medication." (AR 26.) While Dr.  
 13 Agarwal reported that Plaintiff was doing well on his medications (AR 333, 335, 394),<sup>5</sup>  
 14 that finding suggests only that Plaintiff was observed to have positively responded to  
 15 treatment. Again, the ALJ does not reason how this observation contradicts Dr.  
 16 Agarwal's findings that Plaintiff's abilities are limited by his neuropathy. Comparatively,  
 17 Dr. Agarwal continued to note that Plaintiff's diabetes was uncontrolled, and at most  
 18 examinations, he advised Plaintiff to continue on his medications, indicating it was  
 19 medically necessary to do so. (*See e.g.* AR 333, 395.) Dr. Agarwal also referred Plaintiff  
 20 to a neurologist due to the continued numbness he was experiencing. (AR 333.)

21 In contrast, the ALJ gave "great weight" to the opinion of "State Agency  
 22 reviewer" Rosalia Pereyra, reasoning that her opinion was consistent with the totality of  
 23 the evidence. (AR 24-25.) However, in reviewing the denial of Plaintiff's disability claim  
 24 on reconsideration, Pereyra, a Doctor of Psychology (Psy.D), primarily considers the  
 25 record of Plaintiff's mental limitations. (AR 78-89.) Dr. Pereyra noted "[n]o RFC/MRFC  
 26 assessments" were associated with the claim, and summarily determined Plaintiff was not  
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28 <sup>5</sup> Plaintiff was prescribed Lantus for his diabetes and Neurontin (or Gabapentin) for  
 his neuropathy. (*See* AR 335, 387, 390, 401-02.)

1 disabled. (AR 87, 89.) Further, Dr. Pereyra stated in her opinion that she gave “great  
2 weight” to the opinions of Dr. Brecheisen, Dr. Barker, and Dr. Joseph (AR 87), opinions  
3 which the ALJ assigned either “little weight” or “some weight” (AR 25-26).

4 The ALJ did not offer reasons that are specific, legitimate, and supported by the  
5 record, and therefore erred in rejecting Dr. Agarwal’s opinion. Having reached this  
6 conclusion, the Court need not address Plaintiff’s arguments concerning the ALJ’s  
7 evaluation of Dr. Reynolds opinion or lay witness testimony.

8 **B. Symptom Testimony**

9 Plaintiff also argues that the ALJ did not offer clear and convincing reasons,  
10 supported by substantial evidence in record, for rejecting Plaintiff’s symptom testimony.  
11 (Doc. 13 at 8-14.)

12 During his hearing before the ALJ, Plaintiff testified that he was diagnosed with  
13 diabetes. (AR 46.) As a result, he suffers from neuropathy that causes numbness in his  
14 feet, calves, and hands, as well as shooting pains that originate in his toes and shoot up  
15 his body. (AR 47.) The numbness in his feet causes him to often fall and sustain injuries,  
16 such as the scratches on his hand and forehead he exhibited at his administrative hearing.  
17 (AR 48-49.) Plaintiff testified that his diabetes has also caused him to suffer vision loss.  
18 (AR 56-57.) He stated that he is continuously tired and frequently naps, sometimes three  
19 times a day. (AR 48, 59.) He struggles with concentration and must be reminded to do  
20 certain things, such as take his medication or maintain his hygiene. (AR 59.) Plaintiff  
21 indicated that he can only stand for about thirty minutes at one time and can only sit for  
22 thirty to forty minutes at a time. (AR 52-53.) His sleep is frequently disrupted, and he  
23 testified he walks around at night to get the “circulation going.” (AR 52.) Plaintiff  
24 testified he has hearing loss in one ear, cannot read or write due to learning disabilities,  
25 has arthritis in his knees, asthma, depression, and back pain due to spina bifida. (AR 39-  
26 40, 53-58.) Plaintiff indicated that as a result of his depression, he isolates himself from  
27 people and did not leave the house in the past; however, recently, he has begun leaving  
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1 the house four or five days a week and tries to walk for exercise to comply with his  
2 doctor's recommendations. (AR 57-58.)

3 In assessing Plaintiff's residual functional capacity, the ALJ found that while  
4 Plaintiff's impairments could reasonably be expected to cause his alleged symptoms, his  
5 "statements concerning the intensity, persistence and limiting effects of these symptoms  
6 [were] not credible." (AR 23.) The ALJ discredited Plaintiff's pain testimony because:  
7 (1) the severity of his symptoms was inconsistent with the objective evidence of record;  
8 (2) he had received only conservative treatment and was noncompliant with  
9 recommended treatment; (3) he had applied and received unemployment benefits; and (4)  
10 his impairment allegations were inconsistent with his account of why he was terminated  
11 from employment and his reported daily activities. (AR 23-24.)

12 To determine whether a claimant's testimony regarding subjective pain or  
13 symptoms is credible, the ALJ must engage in a two-step analysis. "First, the ALJ must  
14 determine whether the claimant has presented objective medical evidence of an  
15 underlying impairment 'which could reasonably be expected to produce the pain or other  
16 symptoms alleged.'" *Lingenfelter*, 504 F.3d at 1036 (quoting *Bunnell v. Sullivan*, 947  
17 F.2d 341, 344 (9th Cir. 1991)). The claimant, however, "need not show that [his]  
18 impairment could reasonably be expected to cause the severity of the symptom [he] has  
19 alleged; [he] need only show that it could reasonably have caused some degree of the  
20 symptom.'" *Id.* (quoting *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996)).  
21 "Second, if the claimant meets this first test, and there is no evidence of malingering, 'the  
22 ALJ can reject the claimant's testimony about the severity of [his] symptoms only by  
23 offering specific, clear and convincing reasons for doing so.'" *Id.* (quoting *Smolen*, 80  
24 F.3d at 1281). General assertions that the claimant's testimony is not credible are  
25 insufficient. See *Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007). The ALJ must  
26 identify "what testimony is not credible and what evidence undermines the claimant's  
27 complaints." *Id.* (quoting *Lester v. Charter*, 81 F.3d 821, 834 (9th Cir. 1995)). In  
28 weighing a claimant's credibility, the ALJ may consider many factors, including, "(1)

1 ordinary techniques of credibility evaluation, such as the claimant's reputation for lying,  
 2 prior inconsistent statements concerning the symptoms, and other testimony by the  
 3 claimant that appears less than candid; (2) unexplained or inadequately explained failure  
 4 to seek treatment or to follow a prescribed course of treatment; and (3) the claimant's  
 5 daily activities." *Smolen*, 80 F.3d at 1284; *see Orn*, 495 F.3d at 637–39. The ALJ also  
 6 considers "the claimant's work record and observations of treating and examining  
 7 physicians and other third parties regarding, among other matters, the nature, onset,  
 8 duration, and frequency of the claimant's symptom; precipitating and aggravating factors;  
 9 functional restrictions caused by the symptoms; and the claimant's daily activities."  
 10 *Smolen*, 80 F.3d at 1284. Nonetheless, "[o]nce the claimant produces medical evidence of  
 11 an underlying impairment, the Commissioner may not discredit the claimant's testimony  
 12 as to subjective symptoms merely because they are unsupported by objective evidence."  
 13 *Berry v. Astrue*, 622 F.3d 1228, 1234 (9th Cir. 2010); *Lester*, 81 F.3d at 834 (a Plaintiff's  
 14 own testimony of disabling pain cannot be discredited "merely because [it is]  
 15 unsupported by objective evidence."); *Smolen*, 80 F.3d at 1282 (the ALJ was not free to  
 16 reject Plaintiff's subjective symptom testimony "simply because there is no showing that  
 17 the impairment[s] can reasonably produce the degree of symptom alleged."). An ALJ is  
 18 required to make a "credibility determination with findings sufficiently specific to permit  
 19 the court to conclude that the ALJ did not arbitrarily discredit claimant's testimony."  
 20 *Thomas*, 278 F.3d at 958.

21 Here, the ALJ erred in discrediting the severity of Plaintiff's alleged symptoms  
 22 based upon a lack of corroboration by the objective medical evidence. The ALJ found  
 23 Plaintiff's impairments could reasonably be expected to cause the alleged symptoms, and  
 24 cited no finding of malingering. (AR 23). Because the ALJ concluded Plaintiff had  
 25 produced evidentiary proof of his impairments, he erred in discrediting the severity of  
 26 Plaintiff's subjective symptoms because he believed they were unsupported by objective  
 27 evidence. *See Berry*, 622 F.3d at 1234; *Lingenfelter*, 504 F.3d at 1036.

28 The ALJ further erred in relying on Plaintiff's treatment as a basis to discredit his

1 pain testimony. The ALJ first generally cites that Plaintiff's conditions were controlled  
 2 with medication (AR 23), but offers nothing to suggest that the medication alleviated or  
 3 eliminated Plaintiff's pain such that his symptom testimony was incredible. The ALJ  
 4 further relies on Plaintiff's lack of adherence to his diet as a basis to discredit his pain  
 5 testimony, in that he reported drinking "lots of soda" and did not increase his exercise.  
 6 (AR 23-24.) Yet, the ALJ does reason how Plaintiff's purported lack of dieting or  
 7 exercise shows that he is not telling the truth about his medical problems, and he omits  
 8 Plaintiff's testimony regarding his significant weight loss following his diabetes  
 9 diagnosis (AR 67). The ALJ similarly erred in discrediting Plaintiff's testimony on the  
 10 basis that "although he alleged disabling knee pain, the evidence showed he has only  
 11 been given ibuprofen for this condition and has treated it with heat and Bengay" (AR 26).  
 12 Plaintiff testified that there were no alternative treatments available for his arthritis (AR  
 13 55), and the ALJ does not suggest that a more aggressive form exists of which Plaintiff  
 14 could have availed himself. *Cf. Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999)  
 15 (doctor failed to prescribe available serious medical treatment).

16 Next, the ALJ found that "[f]urther reducing the claimant's credibility is the fact  
 17 that he received unemployment compensation... He would have had to certify that he  
 18 was physically and mentally able, willing and available to work in order to be eligible for  
 19 unemployment compensation. This is inconsistent with a claim for disability." (AR 24.)  
 20 The ALJ also erred in discrediting Plaintiff's pain testimony on this basis. "[W]hile  
 21 receipt of unemployment benefits can undermine a claimant's alleged inability to work  
 22 fulltime, the record here does not establish whether [Plaintiff] held himself out as  
 23 available for full-time or part-time work. Only the former is inconsistent with his  
 24 disability allegations." *Carmickle v. Commissioner, Social Sec. Admin.*, 533 F.3d 1155,  
 25 1161-1162 (9th Cir. 2008) (internal citations omitted). (See AR 42-44, 147-149.)

26 The ALJ additionally erred in relying on Plaintiff's termination as a basis to reject  
 27 his pain testimony.<sup>6</sup> The ALJ cites Plaintiff's "last employment further draws his

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28 <sup>6</sup> Further, the ALJ's account that Plaintiff reported having "quit" his position

1 credibility into question. Although he reported he was terminated from his job due to  
 2 crashing equipment and that this was because his neuropathy, EMG was normal for the  
 3 lower extremities. Moreover, as noted above, he also continues to drive, which is very  
 4 inconsistent with his story.” (AR 24.) As addressed above, because the ALJ found  
 5 evidence of Plaintiff’s neuropathy, he may not discredit Plaintiff’s testimony as to  
 6 subjective symptoms merely because they are unsupported by objective evidence. *See*  
 7 *Berry*, 622 F.3d at 1234. Likewise, the ALJ fails to reason how Plaintiff’s ability to drive  
 8 conflicts with his pain testimony. Plaintiff testified that he was terminated when he  
 9 damaged construction equipment due to a lack of sensation in his hands and feet that  
 10 precluded him from deciphering the movement of different objects under the operating  
 11 machinery. (AR 63.) The ALJ fails to explain how this testimony is controverted by  
 12 Plaintiff’s ability to drive a car to familiar nearby locations, such as the city park, the  
 13 grocery store, and his daughter’s house. (AR 53.)

14 Lastly, the ALJ erred in discrediting Plaintiff’s testimony on the basis of his  
 15 reported daily activities. The ALJ cites that Plaintiff “drives his wife to work, fishes at  
 16 the park, and walks for exercise... This is inconsistent with the claimant’s alleged degree  
 17 of neuropathy.” (AR 24.) The ALJ’s credibility determination in this regard is not  
 18 persuasive, in that he failed to make any specific findings regarding whether Plaintiff’s  
 19 daily activities were transferable to the workplace. *See Tommasetti v. Astrue*, 533 F.3d  
 20 1035, 1041 (9th Cir. 2008) (finding a claimant is not required to be “utterly  
 21 incapacitated” to be eligible for benefits, and “many home activities are not easily  
 22 transferable to what may be the more grueling environment of the workplace, where it  
 23 might be impossible to periodically rest or take medication”) (quoting *Fair v. Bowen*, 885  
 24 F.2d 597, 603 (9th Cir. 1989)). Further, Plaintiff’s daily activities, as he described them  
 25 in his testimony, are consistent with his statements about the impairments caused by his  
 26 pain. For example, while the ALJ critiqued Plaintiff’s cell phone use, nothing indicates  
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28 apparently relies on what appears an inaccurate report of a consulting examiner rather  
 than Plaintiff’s own inconsistent statement. (*See* AR 321.)

1 that he would be entirely precluded from using a cellphone because of his impairments or  
 2 the hand braces used to treat his impairment. Plaintiff even distinguished that his ability  
 3 to use a cell phone improved with the assistance of speed dial programming. (AR 68.)  
 4 Nonetheless, the ability to talk on the phone, occasionally drive, or take brief walks, “all  
 5 while taking frequent hours-long rests, avoiding any heavy lifting, and lying in bed most  
 6 of the day, is consistent with the pain” that Plaintiff described in his testimony. *Garrison*  
 7 *v. Colvin*, \_\_ F.3d \_\_, 2014 WL 3397218, \*17 (9th Cir. Jul. 14, 2014).

8 The ALJ did not offer reasons that are clear, convincing, and supported by the  
 9 record, and therefore erred in discrediting Plaintiff’s symptom testimony.

#### 10 **IV. Remand for Award of Benefits**

11 The Court finds that reversal and remand for an award of benefits is appropriate.  
 12 In reversing the decision of an ALJ, the Court may remand with instructions to calculate  
 13 and award benefits where: “(1) the record has been fully developed and further  
 14 administrative proceedings would serve no useful purpose; (2) the ALJ has failed to  
 15 provide legally sufficient reasons for rejecting evidence, whether claimant testimony or  
 16 medical opinion; and (3) if the improperly discredited evidence were credited as true, the  
 17 ALJ would be required to find the claimant disabled on remand.” *Garrison*, 2014 WL  
 18 3397218 at \*20 (discussing “credit-as-true rule”); *see also Smolen*, 80 F.3d 1273;  
 19 *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989). If the “credit-as-true rule” is  
 20 satisfied, the Court may remand for further proceedings, instead of for an award of  
 21 benefits, only “when the record as a whole creates serious doubt as to whether the  
 22 claimant is, in fact, disabled within the meaning of the Social Security Act.” *Garrison*,  
 23 2014 WL 3397218 at \*21.

24 Here, there are no outstanding issues to preclude a disability determination on the  
 25 merits. More evidence and legal argument would not likely shed light on Plaintiff’s  
 26 functional capacity during the period at issue. The parties do not contest and the record  
 27 shows that Plaintiff has severe impairments, and this finding is uncontested by any  
 28 medical opinion in the record. As evident in the record and uncontested by the parties,

1 Plaintiff's impairments could reasonably be expected to cause the conditions which  
 2 Plaintiff alleges.

3 As set forth above, the ALJ gave legally insufficient reasons to reject the opinion  
 4 of Plaintiff's treating physician and Plaintiff's subjective symptom testimony. If the  
 5 improperly discredited evidence were credited as true, it is clear that the ALJ would be  
 6 required to find Plaintiff disabled on remand. The vocational expert testified that a person  
 7 with the limitations opined by Dr. Agarwal, specifically sitting, standing, or walking less  
 8 than two hours in a normal work day, would be precluded from working. (AR 74-75.)  
 9 Likewise, the vocational expert testified that a person with the limitations testified to by  
 10 Plaintiff would not be able to work "at all." (AR 73.)

11 There is also nothing in the record that casts serious doubt as to whether Plaintiff  
 12 is, in fact, disabled. Both of Plaintiff's treating physicians opined that Plaintiff's  
 13 diagnosed physical impairments would preclude him from sustained work. (AR 383-386.)  
 14 These opinions are controverted only by the opinions of one-time examining consulting  
 15 physicians who also diagnosed Plaintiff with his alleged impairments, but then summarily  
 16 concluded that Plaintiff's conditions would impose *no* limitations. (See AR 251-254, 321-  
 17 327.) These examiners offer no explanation for their findings, and their conclusions were  
 18 rejected by the ALJ. (See AR 25-26, finding that "[t]here is sufficient evidence to support  
 19 the claimant's allegation that his impairments affect him more than minimally.")  
 20 Therefore, the Court concludes that these opinions do not create any doubt as to whether  
 21 Plaintiff is disabled.<sup>7</sup>

22 In sum, the Court has considered the record as a whole, weighing both the  
 23 evidence that supports and that which detracts from the ALJ's conclusions. The Court  
 24 finds that the ALJ's decision is not supported by substantial evidence. Crediting as true  
 25 the opinion of Plaintiff's treating physician and Plaintiff's subjective symptom testimony

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26 <sup>7</sup> To the extent that the record also contains opinions of non-examining consultants,  
 27 they also provide no reasonable basis to question the disability finding. See *Lester*, 81  
 28 F.3d at 831 ("[t]he opinion of a nonexamining physician cannot by itself constitute  
 substantial evidence that justifies the rejection of the opinion of either an examining  
 physician or a treating physician.").)

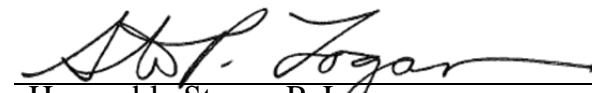
1 as a matter of law, the Court finds that reversal and remand for an award of benefits is  
2 appropriate. *See Lester*, 81 F.3d at 834. Accordingly,

3       **IT IS ORDERED** that the final decision of the Commissioner of Social Security  
4 is **REVERSED**.

5       **IT IS FURTHER ORDERED** that this matter is **REMANDED** to the  
6 Commissioner of Social Security for a computation of benefits.

7       **IT IS FURTHER ORDERED** that the Clerk of Court shall enter judgment  
8 accordingly.

9                      Dated this 14th day of August, 2014.

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12                      Honorable Steven P. Logan  
13                      United States District Judge

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